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IN THE

Supreme Court of the United States

..... TERM, 1968

No. 1202

MOORE-McCORMACK LINES, INC.,

Petitioner,

v.

CARMELO CANDIANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE, and Associate Justices of the Supreme Court of the United States:

Petitioner, Moore-McCormack Lines, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit entered on the first day of August, 1967, affirming the judgment of the United States District Court for the Southern District of New York, and the appeal docketed in the said Court of Appeals as No. 30,696 and the order of the said Court denying rehearing entered on December 4th, 1967.

Opinions of the Court Below

The opinion of the District Court is set forth *infra* at page 1a* and is reported in 1967 A.M.C. 635. The opinion

* Numerical references followed by "a" are to the appendix herein.

of the Court of Appeals for the Second Circuit is set forth *infra* at page 19a and is reported at 382 F. 2d 961. The opinion of the Court of Appeals for the Second Circuit denying rehearing is set forth *infra* at page 23a and is reported at 1967 A.M.C. 2315.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1st, 1967. The order denying the petition for rehearing was entered on December 4th, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 [1].

Questions Presented

1. Should a vessel be held to a breach of the warranty of seaworthiness, *pro tanto,* when safe, proper and defect-free gear is used in a negligent fashion by longshoremen employees of a stevedore?

2. Does "operational negligence" equate, instanter, with unseaworthiness?

3. Assuming that unseaworthiness can be caused by negligence—but not instantaneously—is the test by which the inception of unseaworthiness to be gauged a temporal test or is the proper test based upon a consideration of the nature of the operation involving the negligence?

4. Should this Court countenance the complete destruction of the provisions of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C., Sec. 901 *et seq.* and in particular the exclusivity of liability provisions thereof, 33 U.S.C., Sec. 905?

Statement of the Case

Carmelo Candiano, who was, at the time of his injury, a longshoreman in the employ of John W. McGrath Corp., a stevedoring concern, brought this action to recover damages for injuries sustained by him while he was working aboard the S.S. MORMACHAWK on February 18th, 1961. The complaint of plaintiff contained the usual allegations of negligence on the part of the shipowner [Petitioner herein] and unseaworthiness attributable to the vessel. The Trial Court, having tried the case non-jury, found that plaintiff's injuries resulted from unseaworthiness of the S.S. MORMACHAWK and that the plaintiff was not contributorily negligent. The District Court made, in its opinion, findings of fact which were adopted by Petitioner in the appeal to the Second Circuit and which will be relied upon herein.

Respondent, Candiano, was a ship's carpenter working in the lower hold of No. 3 hatch of the S.S. MORMACKAWK. He was engaged in chocking* cargo. The accident occurred shortly after midnight on the morning of February 18th, 1961, at which time a hatch beam became dislodged from the ship's gear, fell into the lower hold and struck Respondent.

It appears that a group of longshoremen, also in the employ of John W. McGrath Corp., had been engaged in replacing the hatch beam in the No. 3 tween deck hatch. This operation was preparatory to covering up the No. 3 tween deck hatch, since the ship was close to sailing.

The ship's cargo fall was used by the longshoremen to handle the beam in question. This fall terminated in a large ring. Hanging down from the ring were four wires, each wire having a cargo hook [called a pontoon hook] on the end.

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* Erroneously rendered as "checking" in the District Court's opinion.

The beam was attached to the ring by having a hook inserted in a hole in each of the two ends of the beam. The remaining two wires were looped up and placed into the ring itself.

The Trial Court found that this arrangement would have been safe and proper if the cargo hooks at the end of the beam had been passed fully through their respective holes and made fast to the standing part of the bridle thus forming a closed loop. However, the hooks were not passed by the longshoremen fully through the apertures at the ends of the beam. In lowering the beam one of the hooks apparently became dislodged from the end of the beam, causing the beam to fall into the hold.

The Trial Court found that these circumstances warranted a finding of unseaworthiness against the S.S. MORMACHAWK. Judgment was accordingly entered in favor of Respondent [plaintiff below].

Petitioner appealed to the Court of Appeals for the Second Circuit. On August 1st, 1967, the Court of Appeals rendered its decision, affirming the judgment of the District Court. Believing itself to be compelled, under the holding of this Court in *Mascuilli* v. *United States,* 387 U. S. 237, to adopt a rule of law that operational negligence in and of itself constituted unseaworthiness, the Court of Appeals for the Second Circuit expressed the view that it was constrained to affirm the District Court's opinion on such basis.

Petitioner sought rehearing with respect to the Court of Appeals' decision and in so doing pointed out that the Court of Appeals had before it only the summary of the *Mascuilli* decision as contained in the Law Week version [35 L. W. 3052]. This, Petitioner claims, did not correctly reflect the thrust of *Mascuilli.*

By decision dated December 4th, 1967 the Court of Appeals for the Second Circuit denied rehearing, with a con-

curring opinion by Judge Moore. The Court of Appeals found that the fact pattern in the instant case did "under modern concept of unseaworthiness present 'unseaworthy' facts".

Reasons for Granting the Petition for Certiorari

The instant petition seeks a statement by this Court upon an issue which has left maritime law in a confused and chaotic state and which has engendered fundamental disagreements among the various Circuits. The issue involves the extent to which "operational negligence" may, or may not, be identified with the doctrine of "unseaworthiness".

The panel of the United States Court of Appeals for the Second Circuit which below decided the instant case was acutely, perhaps painfully, aware of the lack of harmony in regard to this question both internally within the Second Circuit and among the several Circuits throughout the Country.

> "At the time of the arguments of *Alexander* and *Candiano*, there was a plethora of cases involving negligence and unseaworthiness and a paucity of consistency. No legal principle which might serve as a guide for the future could be gleaned from these decisions. In this circuit, the panels were hopelessly divided,[1] other circuits achieved no greater consistency.[2] Analyses of these conflicts have been made in various deci-

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[1] Compare *Norfleet* vs. *Isthmian Lines, Inc.*, 1966 A. M. C. 80, 355 F. (2d) 359 (2 Cir., 1964); *Guarracino* vs. *Luckenbach Steamship Co.*, 1964 A. M. C. 2240, 333 F. (2d) 646 (2 Cir., 1964); *Massa* vs. *C. A. Venezualen Navigacion*, 1964 A. M. C. 1375, 332 F. (2d) 779 (2 Cir., 1964); *Spinelli* vs. *Isthmian*, 1965 A. M. C. 254, 326 F. (2d) 870 (2 Cir., 1964), *cert. denied*, 377 U. S. 935, 1966 A. M. C. 2792 (1964); *Mosley* vs. *Cia. Mar. Adra S. A.*, 1963 A M. C. 1951, 314 F. (2d) 223 (2 Cir., 1963), *cert. denied*, 375 U. S.

(Footnote continued on following page)

sions with care and discernment. Judges railed against the necessity of stultifying their judicial minds by being required 'to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong' (FRIENDLY, Ct. J., in dissent in *Skibinski* vs. *Waterman S. S. Co.*, 1966 A. M. C. 873, 360 F. (2d) (1964), cert denied, 387 U. S. 921 (1967)) and to make 'trivial, meaningless and confusing distinctions' (KAUFMAN, Ct. J., in dissent in *Radovich* vs. *Cunard S. S. Co.*, 1966 A. M. C. 2426, 2431, 364 F. (2d) 149 (1966))." (25a-26a)

(Footnote continued from preceding page)

829, 1963 A. M. C. 2698 (1963); *Puddu* vs. *Royal Netherlands S. S. Co.*, 1962 A. M. C. 419, 303 F. (2d) 752 (2 Cir. *en banc* 1962); *cert denied*, 371 U. S. 840, 1963 A. M. C. 280 (1962); *Grillea* vs. *United States*, 1956 A. M. C. 1009, 232 F. (2d) 919 (2 Cir., 1956); *Poignant* vs. *United States*, 1955 A. M. C. 1955, 225 F. (2d) 595 (2 Cir., 1955); *Manhat* vs. *United States*, 1955 A. M. C. 513, 220 F. (2d) 143 (2 Cir.), *cert. denied*, 349 U. S. 966 (1955), with *Radovich* vs. *Cunard S. S. Co.*, 1966 A. M. C. 2426, 364 F. (2d) 149 (2 Cir., 1966); *Mosley* vs. *Cia. Mar. Adra S. A.*, 1966 A. M. C. 2017, 362 F. (2d) 118 (2 Cir., 1966); *Skibinski* vs. *Waterman Steamship Corp.*, 1966 A. M. C. 873, 360 F. (2d) 539 (2 Cir., 1966), *cert. denied*, 387 U. S. 921 (1967); *Reid* vs. *Quebec Paper Sales & Transportation Co.*, 1965 A. M. C. 112, 340 F. (2d) 34 (2 Cir., 1965); *Strika* vs. *Netherlands Ministry of Traffic*, 1951 A. M. C. 54, 185 F. (2d) 555 (2 Cir., 1950).

[2] Fifth Circuit:

Dugas vs. *Nippon Yusen Kaisha*, 1967 A. M. C. 2090, 378 F. (2d) 271 (5 Cir., 1967); *Marshall* vs. *Ove Skou Rederi A/S*, 1967 A. M. C. 2537, 378 F. (2d) 193 (5 Cir., 1967); *Robichaux* vs. *Kerr McGee Oil Industries, Inc.*, 1967 A. M. C. 2082, 376 F. (2d) 447 (5 Cir., 1967); *Antoine* vs. *Lake Charles Stevedores*, 1967 A. M. C. 2085, 376 F. (2d) 443 (5 Cir., 1967); *Smith* vs. *M/V Ginza*, 1966 A. M. C. 2036, 362 F. (2d) 164 (5 Cir., 1966); *McQuiston* vs. *Freighters and Tankers Steamship Co.*, 1964 A. M. C. 1489, 327 F. (2d) 746 (5 Cir., 1964); *Neal* vs. *Lykes Bros. Steamship Co.*, 1962 A. M. C. 1959, 306 F. (2d) 313 (5 Cir., 1962); cf. *Morales* vs. *City of Galveston*, 275 F. (2d) 191 (5 Cir.); *vacated and remanded*, 364 U. S. 295 (1960), 1961 A. M. C. 2194, 291 F. (2d) 97 (5 Cir., 1961); *aff'd*, 370 U. S. 165, 1962 A. M. C. 1450 (1962).

(Footnote continued on following page)

The almost hopeless conflict existing today on the issue of "operational negligence" has been noted ruefully by Judge Marshall in *Reid* v. *Quebec Paper Sales & Transportation Co.*, 2 Cir., 1965, 340 F. 2d 34, by Judges Feinberg [for the majority] and Kaufman [for the minority] in *Radovich* v. *Cunard S.S. Co.*, 2 Cir., 1966, 364 F. 2d 149 and by Judge Friendly [dissenting] in *Skibinski* v. *Waterman S.S. Co.*, 2 Cir., 1966, 360 F. 2d 539, 543, among many others. See also the discussion by Hunter, J. in the District Court opinion in *Antoine* v. *Lake Charles Stevedores, Inc.*, D.C.W.D.LA., 1965, 249 F. Supp. 290.

The opinions formulated by the various Circuit Courts reflect a deep and abiding uncertainty as to the present status of the law of unseaworthiness. The Circuits are in great need of assistance and guidance from this Court.

Argument

Petitioner believes that the flux apparent in the current state of the law offers this Court an opportunity to re-examine the basic concepts underlying the doctrine of unseaworthiness and to formulate guidelines by which the lower courts may administer and delimit the judicial enforcement of that doctrine.

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550, Judge Frankfurter spoke of the particular obligation that the Courts owe in regard to the formulation of the doctrines of maritime law:

"No area of Federal law is judge-made at its source to such an extent as is the law of admiralty. The evolu-

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(Footnote continued from preceding page)

Ninth Circuit:

Huff vs. *Matson Navigation Co.*, 1964 A. M. C. 2219, 338 F. (2d) 205 (9 Cir., 1964); *Blassingill* vs. *Waterman Steamship Corp.*, 1964 A. M. C. 1932, 336 F. (2d) 367 (9 Cir., 1964); *Beeler* vs. *Alaska Aggregate Corp.*, 1964 A. M. C. 1976, 336 F. (2d) 108 (9 Cir., 1964); *Billeci* vs. *United States*, 1962 A. M. C. 826, 298 F. (2d) 703 (9 Cir., 1962); *Titus* vs. *Santorini*, 1959 A. M. C. 1042, 258 F. (2d) 352 (9 Cir., 1958). See also n. 10, *infra*."

> tion of judge-made law is a process of accretion and erosion. We are told by a great master that law is civilized to the extent that it is purposefully conscious. Conversly, if law just 'grow'd' like Topsy, unreflectively and without conscious design, it is irrational."

The doctrine of seaworthiness has been an evolving one and has been motivated by the concern of this Court to assure humanitarian treatment of longshoremen. However, until recent times, the circumference of the "unseaworthiness" doctrine has been reasonably well defined. That circumference has hitherto embraced the ship, its gear and the adequacy of its crew. Recent trends would expand the confines of the "unseaworthiness" doctrine so as to include the totality of all shipboard accidents to land based workers. Such an expansion would, Petitioner submits, do violence to both the logical and historical basis of the doctrine and to the Congressional intent as manifest in the Federal Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C., Sec. 901, *et seq.*

Longshore work is concededly dangerous. Though much progress in the realm of safety has been effected by Federal efforts and by the work of employer and labor groups, there is a point of diminishing return. The incidence of danger in longshore work remains high, largely because of the inescapable human element involved. In the final analysis, industrial safety in stevedoring operations depends mainly upon proper and efficient performance of duty by longshoremen and their co-workers—a performance which is not always obtainable no matter what standard of diligence is employed by shipowner and stevedoring companies alike.

Congress has long since recognized that a high hazard field, such as this, requires a special kind of bargain between employers and their workers. In 1927 Congress enacted the Longshoremen's & Harbor Workers' Com-

pensation Act, 33 U.S.C., 901, *et seq.* Section 905 of Title 33 provided that the liability of an employer of a maritime worker covered thereunder should be exclusively in compensation.

Judge Burton of this Court clearly described the legislative purpose underlying this "bargain" between the stevedore industry and its workers in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corporation,* 350 U. S. 124, 129:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment. In return, the employee, and those claiming under or through him, are given a substantial quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims."

Recognizing a dichotomy between the stevedore employer and the shipowner who supplied the work area, this Court evolved the current theory of seaworthiness. *Pope & Talbot* v. *Hown,* 346 U. S. 406; *Seas Shipping Co.* v. *Sieracki* 328 U. S. 85. Concurrent with the broadening of the warranty of seaworthiness was the development of a doctrine of indemnification whereby an offending stevedore was required to recompense a shipowner cast into liability through the stevedore's fault. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.,* 350 U. S. 124. It has been, perhaps understandably, assumed that the shipowner, in recovering indemnification from the stevedore, has been made whole and simply acts as a passive conduit for the imposition of an expanded liability on the stevedore. This, however, is simply not the case. It is ultimately the shipowner and the public which bear the burden of the tragic

waste* caused by transmuting a humanitarian compensation procedure into a wasteful synthetic tort battle.

> "The insidious notion that 'the story will have a happy ending for the ship' apparently stems from the invalid assumption that frustrating the legislative intent of the 'Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905' will hurt only the stevedore and make no 'economic difference', *Reed* v. *The Yaka*, 373 U. S. 410, 414 [1963], to the shipowner. This is not so. . . . The stevedore must and does pass the cost of its third-party liability back to the shipowner by increasing the stevedoring rates to cover the initial exposure. The shipowner, in turn, must and does pass along this additional stevedoring charge to its customers, . . . thereby placing further economic burden upon our . . . ocean commerce."**

It is possible to view the doctrine of "seaworthiness" in either of two fashions:

1. The warranty of seaworthiness should be construed so as to permit any and all shore based maritime workers

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* Litigation procedures are crude and wasteful, often productive of little financial benefit to other than attorneys. Compare, for example, the testimony of Thomas E. Byrne before the House of Representatives Sub-Committee on the Merchant Marine [June 26, 27, 28, 1961] which was considering the Bonner Bill. Mr. Byrne, commenting on the gross economic inefficiency of liability suits, cited the example of the litigation entitled *Holley* v. *The S.S. Manfred Stansfield*, 186 F. Supp. 212, 186 F. Supp. 805. He pointed out that the widow of the deceased longshoreman therein involved netted, as a result of that protracted litigation, the additional sum of $1,597.45 over what she would have received in benefits under the Compensation Act. The process cost the stevedore-employer some $24,293.71 over what its liability should have been under the Compensation Act. What a tragic economic waste!

** [Brief *amicus curiae* in support of petition for certiorari filed by American Merchant Marine Institute in *Waterman Steamship Corporation* v. *Skibinski*, October Term 1966 No. 378.]

who are injured aboard ship to have a recovery based on tort principles.

2. The warranty of seaworthiness should be construed so as to limit tort recoveries to those which fall within a clearly discernible body of maritime law—separate and distinct from and not co-extensive with the range of coverage afforded by Congress in the Longshoremen's & Harbor Workers' Compensation Act.

Till the advent of the "operational negligence" decisions which have sprung mainly from the Third and Fourth Circuits, Federal Courts generally have been quite positive in proclaiming that the doctrine of seaworthiness does not automatically mean a tort recovery for any shore based maritime worker injured aboard ship.

Thus, in *Berti* v. *Compagnie de Navigacion Cyprien Fabre,* 2 Cir., 1954, 213 F. 2d 397, a new trial was granted to the shipowner. It appeared that a cable from a winch dislodged a beam which fell and struck plaintiff. The Court said simply:

> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." 213 F. 2d 400.

A similar factual situation was considered by the Ninth Circuit in *Freitas* v. *Pacific-Atlantic Steamship Company,* 9 Cir., 1955, 218 F. 2d 562. Here again, a winch operator, pulling at an angle, dislodged a strong-back below. In rejecting the claim of the plaintiff-longshoreman who had been hit by a falling hatch board the Court said:

> "The Petterson case is inapposite. Unlike the situation in Petterson, the accident in this instance was directly brought about by an improper, if not foolhardy, use of the ship's gear." 218 F. 2d at page 564.

In *Arena* v. *Luckenbach Steamship Company,* 1 Cir., 1960, 279 F. 2d 186, the First Circuit placed itself in the company of those who rejected the concept of "operational unseaworthiness." There the large rolls of printing paper were being loaded, carried on boards 5′ by 8′. Some contention was made that end boards should have been used instead of side boards. At any rate the plaintiff was injured by falling rolls. The Court disposed of the unseaworthiness claim as follows:

> "The board was not defective simply because the longshoremen who loaded it neglected to do so in the proper fashion . . . A vessel is not unseaworthy simply because the improper type of equipment was used by some one unless, also, it appears that the proper type was unavailable." 279 F. 2d at page 188.

The operative facts involved in the instant case are clear enough. Some longshore co-workers of respondent, took perfectly safe, proper and seaworthy gear, supplied by the ship, and made it fast to a hatch beam in an unsafe and improper way. The action was an incident in the course of raising the hatch beam from the deck and lowering it into position over the No. 3 'tween deck hatch opening. No defect of winch, hook or other gear intervened; no finding was made that any appurtenance of the vessel was, in any manner, defective or unsuited to its function.

The question which was presented to the Court of Appeals was solely and simply this: Did the negligent failure of Respondent's co-workers to pass the cargo hooks fully through the ends of the hatch beam render the ship legally unseaworthy so as to cast Petitioner in liability to Respondent?

That the Court of Appeals for the Second Circuit had difficulty in squaring the finding in Respondent with any coherently predictable principle is apparent from the reading of its initial opinion and the opinion denying rehearing.

Initially, the Second Circuit felt itself bound by what it conceived to be the compulsion of the decision of this Court in *Mascuilli* v. *United States,* 387 U. S. 237. The Court of Appeals noted, in its original opinion, that its prior decision in *Grillea* v. *United States,* 2 Cir., 1956, 232 F. 2d 919, 922, had drawn a distinction between unseaworthiness on the one hand and operational negligence on the other. The Second Circuit adverted to a "long line of other decisions" of that Court which sought to draw a dividing line between what was (compensable) seaworthiness and (uncompensable) operating negligence. However, the Second Circuit believed that this Court had intended, in *Mascuilli,* to abolish all distinction between operational negligence and unseaworthiness and, accordingly, decided that the authority of *Grillea* had been overruled by pronouncement of this Court.

Petitioner (in its petition for rehearing) suggested to the Second Circuit that its apprehension of the extent and rationale of the *Mascuilli* decision was in error. The Second Circuit, though seemingly admitting its error as to the scope of *Mascuilli,* nonetheless denied the petition for rehearing. In so doing, the Court retreated to what must be described, in all fairness, as less than a precise statement of its conception of the presently existing doctrine of unseaworthiness.

But starting with the basic proposition that a vessel may be rendered unseaworthy by the actions of the stevedore's employees, *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396, and that unseaworthiness may arise during the course of the work the vessel is engaged in, *Mitchell* v. *Trawler Racer, Inc.,* 363 U. S. 539, we may then proceed to a consideration of the knotty problem involved in ascertaining when wrongful conduct becomes transmuted from what we have, till now, been calling "negligence" into what we have, till now, been calling "unseaworthiness".

There are three conceivable tests which could be used to fix the criteria for judging whether or not "negligence" has become transmitted into "unseaworthiness". These are:

A. "Operational Negligence"

Any negligent act, occurring aboard a ship which causes injury, entitles the victim to a tort recovery against the ship, provided both the nature of the act and the status of the victim have a sufficiently maritime flavor. In this interpretation of the scope of the unseaworthiness doctrine, negligence and unseaworthiness coincide both temporally and functionally. "The alchemy is instantaneous" (34a).

B. "The Temporal Test"

Negligence may produce unseaworthiness—but only after the lapse of some legally significant period of time.

C. "The Functional Test"

Negligence may produce unseaworthiness—but only after the negligently performed operation has "come to rest".

It is true that there are some who feel that the drawing of any dividing line between unseaworthiness and negligence creates an artificial distinction which might well place an intolerable burden on the Courts charged with enforcing the doctrine. Thus Mr. Justice Marshall, then sitting in the United States District Court for the Southern District of New York, said in *Reid* v. *Quebec Paper Sales & Transportation Company,* 2 Cir., 340 F. 2d 34, 37:

> "One does not have to be unduly cynical to look askance at this distinction, for every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it. Under the rubric of a 'breach of the warranty of seaworthiness' courts

had had shipowners responsible for accidents resulting from unsafe conditions of the work place, regardless of whether the shipowner had actual or constructive notice or the means or opportunity of correcting them, and, if all assessments of fault are to be truly irrelevant, *it is not at all clear why this responsibility does not encompass any conduct at the work place which creates a threat to the safety of the other workmen.*" [emphasis supplied]

Though Mr. Justice Marshall was careful to recognize the fact of a distinction, wherever that distinction lay, other Circuit Courts have not been so meticulous. Thus it is difficult to square certain decisions of the Third and Fourth Circuits with any other rationale save acceptance by those Courts of an identity between operational negligence and unseaworthiness. Cf. *Thompson* v. *Calmar,* 3 Cir., 1964, 331 F. 2d 657; *Ferrante* v. *Swedish American Line,* 3 Cir., 1964, 331 F. 2d 571, cert. denied 379 U. S. 801; *Knox* v. *United States Lines Company,* 3 Cir., 1961, 294 F. 2d 354; *Scott* v. *Isbrandtsen,* 327 F. 2d 113. See also *Huff* v. *Matson Navigation Co.,* 9 Cir., 1964, 338 F. 2d 205.

Nonetheless there is both historical and logical justification for rejecting the notion that unseaworthiness and negligence are interchangeable concepts.

In its various pronouncements, this Court has always carefully adhered to a recognition that negligence and unseaworthiness represented two distinct concepts. For example see *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327, and *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539. The historical and jurisdictional reasons which have preserved a distinction between negligence and unseaworthiness are too well known to require extensive elaboration here. However, that distinction has been faithfully adhered to, until recently, by the various Circuit Courts.

Thus, in *Royal Mail Lines, Ltd.* v. *Peck,* 9 Cir., 1959, 269 F. 2d 857, 860, the Court said:

> "Negligence and unseaworthiness are not equivalent. A finding of negligence is neither a substitute foundation for nor a finding of unseaworthiness."

As recently as 1967 the Fifth Circuit took pains to explain that operational negligence and the legal doctrine of unseaworthiness are not at all the same thing. In *Price* v. *S.S. Yaracuy,* 5 Cir., 1967, 378 F. 2d 156, 160, the Court said:

> "Appellant does not take issue with the District Court's ruling that operational negligence of otherwise seaworthy equipment by a fellow longshoreman does not make a vessel unseaworthy. The District Court correctly stated the law of this Circuit.*

The Court of Appeals for the Second Circuit itself adhered to the proposition that the idea of negligence was not simply one of the forms which unseaworthiness might take. In the landmark case of *Grillea* v. *United States,* 2 Cir., 1956, 232 F. 2d 919,** it was said:

> "However, it is at times hard to say whether a defeat in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an accident in a continuous course of operation, which will fasten liability upon the owner

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* In *McQuiston* v. *Freighters & Tankers S.S. Co.,* 5 Cir., 1962, 327 F. 2d 746, 747, the Fifth Circuit said "There can, of course, be no dispute that a shipowner is not liable for the negligence of longshoremen acting as servants or employees of an independent stevedoring contractor, unless such negligence creates an unseaworthy condition."

See also *Vickers* v. *Tumey,* 5 Cir., 1961, 290 F. 2d 426.

** This principle was reaffirmed by the Second Circuit in *Norfleet* v. *Isthmian Lines,* 2 Cir., 1966, 355 F. 2d 359.

only in case it is negligent, or as an unfitness of the ship that makes her *pro tanto* unseaworthy." 232 F. 2d at page 922.

Thus it will be seen that both this Court and most of the Circuit Courts have refused to obliterate the dividing line between operational negligence and unseaworthiness. This does not at all mean that operational negligence may never ripen into an unseaworthy condition; it simply means that the gestation of the negligence and the gestation of the unseaworthiness should not be simultaneous.

The Second Circuit, in its opinion denying rehearing herein, seized upon certain language from an opinion of Judge Feinberg in the District Court as a basis for denying rehearing, the impropriety of the standard originally used by the Court notwithstanding. The Court pointed to the fact that the District Court had held that an "appreciable period of time" intervened between the making fast of the cargo gear to the hatch beam and the actual happening of the accident. It expounds the view that the decisions which have intervened between the original decision in the instant case and the present have only strengthened "the conclusion that the negligent hookup followed by 'an appreciable period of time' " would create an unseaworthy condition.

The Court of Appeals accordingly would appear to interject some temporal criteria into the consideration of whether or not a negligent act has "ripened" into an unseaworthy condition. This position was taken by the Court in spite of the fact that it earlier admitted that "the time element in the operation is obviously irrelevant". It is difficult to speak with certitude, in view of these apparently irreconcilable theses but it would seem that the Court of Appeals has fallen back upon the temporal yardstick as the measure of when negligence becomes unseaworthiness.

If this indeed is the case, it would be in contraventions of positions previously expressed by the same Court. Thus

in *Puddu* v. *Royal Netherlands Steamship Company*, 2 Cir., 1962, 303 F. 2d 752, 757, Judge Hayes said in a concurring opinion with respect to the so-called "temporal test":

> "The situation demands, then, that without regard to fault, we fix a point of absolute liability. But logical coordinates for fixing a point, such as a time in which a particular condition continues to exist, are entirely lacking. *Time is obviously irrelevant* since notice to the shipowner is of consequence only if liability is limited by fault." (Emphasis supplied.)

In *Skibinski* v. *Waterman Steamship Corporation*, 2 Cir. 1966, 360 F. 2d 539, 543, the following observation was made concerning the treacherousness of any temporal test.

> "If the test is a temporal one, a more accurate stop watch than I possess would be needed to explain why *Reid* v. *Quebec Paper Sales & Transportation Co.*, 340 F. 2d 34 [2 Cir. 1965], should have gone one way and *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752 [2 Cir.] cert. denied, 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 [1962], and *Spinelli* v. *Isthmian S.S. Co.*, 326 F. 2d 870 [2 Cir.], cert. denied, 377 U. S. 935, 84 S. Ct., 1338, 12, L. Ed. 2d 298 [1964], the other."

Petitioner submits that a consideration of the body of decisional law as it existed prior to the flights of the Third and Fourth Circuit into "Operational Negligence" theory, compels the belief that the proper test of the inception of unseaworthiness is functional, not temporal.

A reading of the decisions post-dating *Grillea* (*infra*) or (at least all those decisions which do not espouse the view that negligence and unseaworthiness are interchangeable concepts) is instructive. Petitioner believes that a pattern is discernible. This pattern teaches that a properly formulated test of the inception of unseaworthiness is a functional test directly related to the operation being

conducted. The Courts, we submit, have implicitly and explicitly recognized the propriety of using a functional, rather than a temporal, test as will be seen from a brief review of some of the decisions in this area of law.

In *Manhat* v. *United States,* 2 Cir., 1955, 220 F.2d 143, three workers had been engaged in their labors in a life boat for some period of time (described by the Court as a "short period") before the life boat fell. Apparently, the releasing mechanism of the life boat had been made operative shortly before. The opinion of the Court in no wise suggested that a judicial stop watch should be employed to count the number of seconds between the releasing of the gear and the subsequent falling of the boat.

In *Billeci* v. *United States,* 9 Cir., 1962, 298 F. 2d 703, a longshoreman was injured as the result of a malfunction of a winch. A locking pin positioned in the strap was supposed to be used to prevent the winch from falling out of gear. The locking pin was not used for a period of one and half hours prior to the accident—*but the winch was in continuous use.* The Court, in finding against the plaintiff, drew a clearly distinguishable line of demarcation between a situation in which a negligent operation had terminated (leaving the residue of a negligently created dangerous condition) and a situation where the operation causing danger was still going on.

> "The instant case is distinguishable from both Crumady and Grillea. This is not a case where the negligent act had *terminated* and an appliance was left in an unsafe condition. As the trial court observed, the locking pin does not remain in a fixed position during stevedoring operations, but must be moved in and out whenever it becomes necessary to shift gears . . . Plaintiff's injury was sustained by the negligent *use* of a seaworthy appliance at the very moment of injury. As the trial court aptly said: 'The vessel was unsafe only so long as the negligence continued, where-

as in Grillea, the negligent act terminated shortly after it began, but the unsafe situation continued to exist." 298 F. 2d 706, 707.

These, and similar decisions, teach that the significant criteria are not temporal in nature. If time alone were indeed the criterion it would be difficult to understand how unseaworthiness can eventuate in a few seconds in one situation, while in another a period of one and half hours is insufficient to produce unseaworthiness. Did it take some longer period of time to raise the improperly secured hatch beam in the instant case than to raise the two heavy draft in *Spinelli* v. *Isthmian Steamship Co.*, 2 Cir., 1964, 326 F. 2d 870, where the Court of Appeals held that no unseaworthiness was present? What is the significant difference between the "appreciable" period of time found here by the District Court and the period of time which it took to highline the rain tent in *Puddu* v. *Royal Netherlands Steamship Co.*, 2 Cir., 1962, 303 F. 2d 752?

In many of the cases dealing with borderline situations the Courts advert to the "coming to rest" of the negligently carried out operation. Thus in *Robichaux* v. *Kerr McGee Oil Industries Co., Inc.*, 5 Cir., 1967, 376 F. 2d 447, the Court of Appeals held that an unseaworthy condition as distinguished from mere negligence would come into being only "if the negligence of the fellow workers had come to rest and the equipment had been left in an unsafe condition" 376 F. 2d at p. 449. The concept that the negligence and the conduct of the operation must have "come to rest" was also advanced by the Fifth Circuit in *Antoine* v. *Lake Charles Stevedores, Inc.*, 5 Cir., 1967, 376 F. 2d 443.

Petitioner cannot imagine a distinction between the facts involved herein and the facts which were present in the case of *Massa* v. *C. A. Venezuelan Navigacion*, 2 Cir., 1964, 332 F. 2d 779, cert. denied 379 U. S. 914.

In the *Massa* case, four longshoremen were attaching ship's gear (a tall, bridle and two plug type pallet bars) to a plug type pallet located on the string piece of the pier. The pallet which they wished to attach was the topmost in a pile of three or four pallets. Inadvertently two of the longshoremen placed the plugs of the bridle on one side of the pallet in the second pallet from the top rather than in the top pallet. This meant that when a strain was taken on the ship's fall, the top pallet was being lifted by one side of the bridle, whereas the second pallet was being lifted by the other side. This strange arrangement rose into the air for a few feet, then toppled, dumping cans upon plaintiff in that case, causing him injury. It was alleged that the improper positioning of the plugs with respect to the pallets had created an unseaworthy hook-up. The Court of Appeals disagreed and held that the negligence of the longshoremen was the sole cause of the accident.

This Court denied certiorari.

On the facts, petitioner submits, there can be no distinction between the improperly positioned plugs in *Massa* and the improperly secured hooks in the instant case. In *Massa,* an "appreciable" period of time had elapsed between the placing of the plugs, the signal to the gangway man, the strain on the line and the rising of the draft. Nonetheless, no unseaworthiness was found for the simple reason that the negligence and the accident were part and parcel of the very same continuous operation.

In the case at bar, the use of the ship's gear to position a hatch beam was a single, integral operation of limited scope and duration. The operation itself is but one step in the process of recovering the square of an intermediate deck hatch—one step of many.

The Trial Court found that the injuries suffered by respondent eventuated as the direct result of negligence on

the part of other longshoremen. The operation in which the negligence was involved was still actually in progress.

At no time—whether we characterize the length of time it took from the insertion of the hooks to the actual happening of the accident as "short", "momentary" or, as did the District Court, "appreciable"—had the operation of raising and repositioning the hatch beam terminated or "come to rest". At no time can it be said that the workers, guilty of negligence, turned their attention to other tasks. At no time prior to the accident had the negligence of these longshoremen become static rather than dynamic.

In failing to appreciate that the true test of a gestation of unseaworthiness was functional rather than temporal the District Court [1a] applied an erroneous standard. The Court of Appeals, in opting for the doctrine of "operational negligence", also fell into error, though of a different kind.

CONCLUSION

The judgment in favor of respondent [plaintiff below] should be set aside and the Lower Court directed to enter judgment in behalf of petitioner herein.

Respectfully submitted,

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APPENDIX